

APR 17 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LUIS ENRIQUE SIERRA-GAITAN, aka
John Doe,

Defendant - Appellant.

No. 05-50402

D.C. No. CR-05-00081-JFW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Submitted April 13, 2006**

Before: SILVERMAN, McKEOWN and PAEZ, Circuit Judges.

Luis Enrique Sierra-Gaitan appeals the sentence imposed following his guilty plea to being a deported alien found in the United States in violation of 8 U.S.C. § 1326.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Sierra-Gaitan contends that the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is severely limited, and that the district court violated his constitutional rights in enhancing his sentence under 8 U.S.C. § 1326(b) based on a non-jury fact finding regarding his prior conviction. *See United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005) (holding that we are bound to follow *Almendarez-Torres*, even though it has been called into question, unless it is explicitly overruled by the Supreme Court). Similarly, there is no merit to Sierra-Gaitan's remaining contention that 8 U.S.C. § 1326(b) is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See United States v. Ochoa-Gaytan*, 265 F.3d 837, 845-46 (9th Cir. 2001) (holding that *Apprendi* carved out an exception for prior convictions that specifically preserved the holding of *Almendarez-Torres*). Sierra-Gaitan concedes that his contentions are foreclosed by this court's recent decisions, but raises them to preserve the issues on appeal.

AFFIRMED.